

REPUBLIC OF SOUTH AFRICA




IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

A 785/12

6/11/2012

(1)	REPORTABLE: YES (NO)
(2)	OF INTEREST TO OTHER JUDGES: YES (NO)
(3)	REVISED.
2012. 11. 02	
DATE	SIGNATURE

**MAGISTRATE: S MUEDI
FOCHVILLE**

High Court Reference No. 1388
Magistrate serial No. 16/2012
Review Case No. A670/11

THE STATE vs PETER PUSELETSO MOTLOUNG

REVIEW JUDGMENT

MAKGOKA, J:

[1] The accused, a 39 year old male, was charged in the magistrate court, Potchefstroom, with driving whilst under the influence of intoxicating liquor or a drug having a narcotic effect, alternatively reckless or negligent driving, alternatively inconsiderate driving.

[2] On 17 November 2011 the accused pleaded to the main count. After questioning the accused in terms of s 112 of the Criminal Procedure Act, 51 of 1977, (the Act) the magistrate was not satisfied with the plea explanation. He entered a plea of not guilty in terms of s 113 of the Act. The State led evidence, after which, the accused was convicted of the main count and sentenced to pay a fine of R6000-00 (six thousand rand) or, by default, to undergo a period of 12 (twelve) months' imprisonment. He was given the opportunity to pay a deferred fine.

[3] When the matter came before me for review, I directed a query to the learned magistrate concerning the apparent lack of explanation to the accused of his rights to legal representation and to the nature, purpose and scope of cross-examination. These rights seemed not to have been explained to the accused at any stage of the proceedings.

[4] The trial magistrate responded to the above query as follows:

1. Indeed it appears from the record that the accused's right to legal representation was either not explained to him or not properly recorded. ...
 - 1.1 ...
 - 1.2 ...
 - 1.3 The writer is of the opinion that the above irregularity did not lead to failure of justice, the guilt of the accused had been proven beyond reasonable doubt. The proceedings were in accordance with justice. The accused is an educator and had it been his intention to be represented, the writer is of the opinion that he could have made his wishes known in the course of the proceedings.
2. The writer agrees with the Honourable Justice, the explaining regarding nature, purpose and scope of cross-examination was not fully and properly explained,

the writer should have gone further than that. However, looking at the proceedings in general and the totality of evidence during trial the court's failure to comply with the above rules of the criminal procedure was not fundamental and serious and could therefore not lead to failure of justice."

[5] The Director of Public Prosecution was requested to comment on the matter. In a helpful opinion, the Senior State Advocate and the Deputy Director Public Prosecutions, North Gauteng, are of the view that the failure by the learned magistrate resulted in an irregularity which vitiated the proceedings. They recommend that the proceedings be set aside. I do not agree.

[6] The crucial question remains what legal effect such irregularity had on the proceedings at an accused's trial. Failure by a presiding officer to inform an unrepresented accused of his right to legal representation, if found to be an irregularity, does not per se result in an unfair trial necessitating the setting aside of the conviction. See *Hlantlala and Others v Dyantyi NO and Another* 1999 (2) SA 541 (SCA) at 545f-h; and *S v May* 2005 (2) SACR 331 (SCA) para 7. In *S v Moodie* 1961 (4) SA 752 (A), in considering the effect(s) of an irregularity or irregularities, the court remarked that:

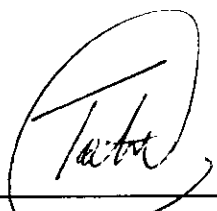
- "(1) the general rule in regard to irregularities is that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial Court would inevitably have convicted if there had been no irregularity.
- (2) In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is per se a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial court would inevitably have convicted if there had been no irregularity.
- (3) Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity."

I am of the view that in the circumstances of the case, the accused would still have been convicted if there had been no irregularity. He had initially pleaded guilty and it appears from the record that his main concern was sentence. The evidence is overwhelming against him.

[7] I therefore agree with the learned magistrate that, in the totality of circumstances, the accused suffered no prejudice resulting in a failure of justice. In the result I am satisfied, and conclude, that the proceedings were in accordance with justice. The conviction should be confirmed.

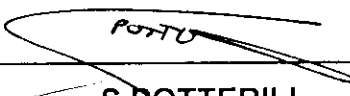
[8] Accordingly I make the following order:

1. The conviction and sentence are confirmed.



TM MAKGOKA
JUDGE OF THE HIGH COURT

I agree



S POTTERILL
JUDGE OF THE HIGH COURT